STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2014
v	No. 316801 Gratiot Circuit Court
ROBWRICK EDWARD SMITH, Defendant-Appellant.	LC No. 12-006601-FC

Before: METER, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant, Robwrick Edward Smith, appeals as of right his conviction, following a jury trial, of first-degree criminal sexual conduct (CSC I).[1] The trial court sentenced Smith to serve 25 to 50 years' imprisonment. We affirm.

I. FACTS

A. BACKGROUND FACTS

The complainant, Smith's six-year-old daughter, testified that she went to Smith's house for a weekend in April 2012. According to the complainant, she was playing video games with Smith when he pulled down her pants and underwear and "put his head in [her] vagina." The complainant explained that Smith kissed and licked her vagina. Smith told her not to tell anyone, but she told her mother when she went home.

According to the complainant's mother, when she asked the complainant how the weekend went, the complainant said that she could not talk about it. The complainant's mother testified that the complainant eventually told her that Smith "put his head in [her] vagina." The complainant was crying and visibly distraught. The complainant's mother called the police and took the complainant to the emergency room.

[1] MCL 750.520b(l)(a) (sexual penetration with a person less than 13 years of age).

B. SUPPRESSION HEARING

St. Louis Police Department Sergeant Richard Ramereiz testified that he interviewed Smith on May 3, 2012. Ramereiz went to Smith's apartment to speak with him. According to Ramereiz, he told Smith that he was investigating a complaint involving Smith's daughter, and Smith voluntarily accompanied him to the police station in Sergeant Ramereiz's police car.

Sergeant Ramereiz interviewed Smith at the police station. According to Sergeant Ramereiz, Smith initially denied the incident. However, after Sergeant Ramereiz took a DNA sample from Smith, Smith stated that he had pulled the complainant's pants down and licked or kissed the outer part of her vagina. Smith then said that he wanted help and seemed distraught. Sergeant Ramereiz decided to arrest Smith because he was concerned about Smith's emotional state.

At trial, Smith's sister testified that Smith does not read or write well. Smith's sister also testified that Smith becomes confused. Smith's girlfriend testified that Smith is a slow learner.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.[2] Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.[3] We review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved crime's elements beyond a reasonable doubt.[4]

B. LEGAL STANDARDS

MCL 750.520b provides that it is first-degree criminal-sexual-conduct for a person to engage in sexual penetration with a person less than 13 years old:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age. . . .

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[2] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[3] *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

[4] *Id.*; *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

Sexual penetration includes cunnilingus.[5] Cunnilingus occurs when a person places his or her mouth on a female's external genital organs.[6] "The labia are included in the genital openings of the female."[7]

C. APPLYING THE STANDARDS

Smith contends that the evidence was insufficient to prove that he engaged in sexual penetration with the complainant. We disagree.

Here, the complainant testified that Smith licked or kissed her vagina. Sergeant Ramereiz testified that Smith told him that Smith had pulled the complainant's pants down and licked or kissed the outer part of the complainant's vagina. Viewing this evidence in the light most favorable to the prosecution, a reasonable juror could find that Smith performed cunnilingus, a form of sexual penetration, on the complainant.

Accordingly, we conclude that the prosecutor sufficiently proved that Smith engaged in sexual penetration with the complainant.

III. MOTION TO SUPPRESS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion to suppress and whether police conduct violated the Fourth Amendment.[8] We review for clear error the district court's findings of fact at a suppression hearing.[9] The trial court's finding is clearly erroneous if we are definitely and firmly convinced that it made a mistake.[10] We review de novo whether a defendant was in custody at the time that the defendant made incriminating statements.[11]

B. LEGAL STANDARDS

Miranda[12] warnings exist to protect a defendant's privilege against compelled self-incrimination under the United States and Michigan Constitutions.[13] Under *Miranda*, the

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[5] MCL 750.520a(r).

[6] *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992).

[7] *Id*. (quotation marks and citation omitted).

[8] *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009).

[9] *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

[10] *Mendez*, 225 Mich App at 382.

[11] *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001).

[12] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prosecutor may not use any statements that a defendant made during a custodial interrogation unless the defendant waived his or her privilege against self-incrimination.[14]

"Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way."[15] Thus, a defendant is only entitled to *Miranda* warnings if he or she is in custody.[16] A defendant is in custody if, considering the totality of the circumstances, the defendant reasonably believed that he or she was not free to leave.[17]

C. APPLYING THE STANDARDS

Smith contends that, under the totality of the circumstances, he was in custody during Sergeant Ramereiz's interview and was thus entitled to *Miranda* warnings. We disagree.

Here, Sergeant Ramereiz did not place Smith under arrest until after his statement. Smith voluntarily accompanied Sergeant Ramereiz to the police station in Sergeant Ramereiz's police car. Sergeant Ramereiz repeatedly informed Smith that he was free to leave. The interview lasted less than two hours. Sergeant Ramereiz testified that he asked Smith if he was comfortable, and Smith stated that he was comfortable. Sergeant Ramereiz briefly closed the door to the interview room, but the door was not locked and Smith at one point opened the door himself. There is no indication that Smith did not understand the questions or the circumstances.

We conclude that, even presuming that Smith has a low intelligence and education level, under the totality of the circumstances, a reasonable person in Smith's position would have believed he or she was free to leave. Therefore, we conclude that the trial court did not err by denying Smith's motion to suppress his statement because Smith was not in custody and was not entitled to *Miranda* warnings when he made the statement.

IV. CRUEL OR UNUSUAL PUNISHMENT

A. STANDARD OF REVIEW

This Court reviews de novo preserved issues of constitutional law, including whether a mandatory sentence is cruel or unusual punishment.[18]

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[13] *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

[14] *Miranda*, 384 US at 444.

[15] *Id*.

[16] *People v Hill*, 429 Mich 382, 392; 415 NW2d 193 (1987).

[17] *Id*. at 384; *Mendez*, 225 Mich App at 382-383.

[18] *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

B. LEGAL STANDARDS

The Michigan Constitution prohibits cruel *or* unusual punishment.[19] The United States Constitution prohibits cruel *and* unusual punishment.[20] Accordingly, Michigan's constitution provides broader sentencing protection than the federal constitution.[21] If a sentence is constitutional under Michigan's constitution, it is also constitutional under the federal constitution.[22]

The Michigan Constitution prohibits grossly disproportionate sentences.[23] We presume that statutes are constitutional.[24] This Court has concluded that Michigan's mandatory 25-year sentence for CSC I with a preteen victim, regardless of the presence of aggravating factors, is constitutional.[25]

C. APPLYING THE STANDARDS

Smith contends that his mandatory minimum sentence of 25 years' imprisonment is unconstitutionally cruel or unusual because it is grossly disproportionate to his offense. This Court has previously decided that Michigan's mandatory sentence for CSC I with a preteen victim is not cruel or unusual punishment.[26] The rule of stare decisis binds this Court to follow our previous decision.[27] But even were we not bound to follow our previous decision, we agree with its reasoning.

To determine whether a penalty is cruel or unusual, courts should consider (1) the severity of the penalty and the gravity of the offense, (2) the penalty compared to other penalties under Michigan law, and (3) the penalty compared to penalties imposed for the same offense in other states.[28] "All criminal-sexual-conduct cases involving young children are heinous,"[29] and cunnilingus with a child is a "crime[] of the most heinous, shocking and disgusting nature."[30]

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[19] Const 1963, art 1, § 16.

[20] US Const, Am VIII.

[21] *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

[22] *Id*.

[23] *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992).

[24] *Benton*, 294 Mich App at 203.

[25] *Id*. at 206-207.

[26] *Id*. at 207.

[27] MCR 7.215(C)(2).

[28] *Bullock*, 440 Mich at 33-34; *Benton*, 294 Mich App at 204.

[29] *People v Smith*, 482 Mich 292, 311 n 42; 754 NW2d 284 (2008).

[30] *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987).

Such an act "violates deeply ingrained social values of protecting children from sexual exploitation."[31] The 25-year minimum sentence is comparable to sentences in Michigan and other states.[32] Accordingly, we conclude that Smith's sentence is constitutional.

V. CONCLUSION

We conclude that the evidence was sufficient to support Smith's CSC I conviction when he kissed or licked the six-year-old complainant's vagina, and that the mandatory 25-year minimum sentence for this conduct was constitutional. We also conclude that the trial court did not err when it declined to suppress Smith's statement because Smith was not in custody when he gave the statement.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Michael J. Riordan

[31] *Benton*, 294 Mich App at 206.

[32] *Id*. at 206-207.